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Nos. 778, 779, 830, 831, 832, 835, 836 and 836

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In the Supreme Court of the United States

OCTOBER TERM, 1967

THE PENN-CENTRAL MERGER AND N&W INCLUSION CASES

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION TO AFFIRM

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Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

A. THE COMMISSION'S PROCEEDINGS

The background of the Penn-Central merger and its relation to the Norfolk and Western Inclusion proceeding are described in this Court's prior opinion (*Baltimore & Ohio R. Co.* v. *United States,* 386 U.S. 372). To recapitulate briefly, the Pennsylvania Railroad Company (Penn) and the New York Central

Railroad Company (Central) filed a joint application on March 9, 1962, seeking the Commission's approval under Section 5(2) of the Interstate Commerce Act of their proposed merger (Penn-Central). Numerous railroads, States, municipalities, shippers and public bodies intervened, and the Commission's Bureau of Inquiry and Compliance participated. The eventual consensus—with the exception of Mr. Milton J. Shapp, a Pennsylvania citizen, and a few communities—was that, if properly conditioned, the merger would be in the public interest. The controversy centered upon the precise terms of the conditions which should be required.

One of the principal problems—and the one with which this Court was primarily concerned last Term—was the situation of three of the smaller Eastern railroads, Erie-Lackawanna Railroad Company (E–L), Delaware and Hudson Railroad Company (D&H) and the Boston and Maine Corporation (B&M). In 1964, when the Commission had approved the merger of the Norfolk and Western (N&W) and Nickel Plate railroads, it had imposed a condition (Appendix O) retaining jurisdiction for five years to permit the filing of petitions by E–L, D&H and B&M for inclusion in the N&W system. Appendix O further provided that N&W's consummation of the merger would constitute "acquiescence in and irrevocable assent to" such conditions, subject only to judicial review. *Norfolk & W. Ry. Co. and New York, C & St. L. R. Co.—Merger,* 324 I.C.C. 1, 148. E–L, D&H and B&M all filed petitions pursuant to Appendix O and expressed a preference for inclusion in N&W. However, since this matter

had not yet been determined by the Commission, the three roads also filed alternative petitions seeking inclusion in Penn-Central. They contended that inclusion in one of the two major systems was essential to their survival.

The Commission recognized in its first report in the Penn-Central Merger proceeding that it was "doubtful that, without inclusion in a major system, these three carriers could withstand the competition" of the merged Penn-Central, and concluded that it was necessary that E–L, D&H and B&M be "protected during the period necessary to determine their future" (327 I.C.C. at 532). *Sua sponte,* the Commission provided for two types of protection for the three roads: first, in the event the petition of one of the three lines for inclusion in N&W should be denied, that line would have the right within one year to petition for inclusion in Penn-Central;[1] and second, it provided unprecedented protective conditions—the so-called Appendix G conditions in the merger order—to assure the survival of the three lines pending their opportunity for actual inclusion in a major eastern rail system. The Appendix G conditions are in two basic categories: (1) traffic conditions, requiring Penn-Central to continue to maintain the rate and routing situation on traffic as to which E–L, D&H and B&M are com-

[1] In the event that the petitions for inclusion of the three roads into N&W were granted, the Commission declared it would take no further action on the alternative petitions for inclusion in Penn-Central, and that "[t]hey will be considered dismissed as moot without further order herein, concurrently with any grant in whole or in part of the petitions in *N&W* merger case becoming effective." 327 I.C.C. at 530–531.

petitive factors, as though the merger had not occurred; and (2) a revenue indemnity provision, requiring Penn-Central to indemnify each protected road to the extent that such road's revenue was proportionally less in a given year, in relation to the revenues of Penn-Central. Subject to such conditions, the Commission concluded that immediate consummation of Penn-Central would be in the public interest.

The revenue indemnity conditions were immediately attacked—both by the protected carriers, who urged that the terms were insufficient to fully protect them; and by competing railroads such as N&W, who took the position that such conditions would have an adverse effect upon them. In response, the Commission in its second report of September 16, 1966, reopened the proceedings for further hearings on the revenue indemnity conditions. Additional hearings were also ordered to consider the request of the three protected lines for the imposition of a "capital loss indemnity condition", under which Penn-Central would have been required to compensate the stockholders of the three lines for any loss in capital value—as reflected in the purchase price established for their inclusion in N&W—which the Commission might find to result from the Penn-Central merger. Providing that consummation of the merger "will constitute irrevocable assent on the part of the applicants [Penn and Central] to any modification" of the traffic and indemnity conditions resulting from the further hearings, the Commission authorized immediate consummation of the merger (328 I.C.C. at 328–329).

In the meantime, hearings on the application of the three roads for inclusion into the N&W system under Appendix O (the *Inclusion* case) had been completed and exceptions to the presiding officer's recommendations were pending before the Commission.

It was in this posture that the case came before this Court last Term. Emphasizing that it was not passing upon "the validity of the merger, the special conditions of Appendix G, the modified order of the Commission, or the peripheral points posed by the various parties," this Court concluded that "in light of the findings as to the necessity for interim protection for the so-called protected railroads, the Commission erred in permitting the consummation of the merger prior to and without awaiting determination of the inclusion proceedings" (386 U.S. at 378).

Following the remand, the Commission completed its further hearings on the Appendix G conditions and the proposed capital loss indemnity condition, and its final decisions in both the Merger case and Inclusion case were served on June 12, 1967. In the Inclusion case, the Commission determined that inclusion of all three of the protected lines in N&W was in the public interest, and fixed fair and equitable terms for their inclusion.[2] It required N&W,

[2] It began with the experienced income of the three lines and adjusted their earnings for savings and gains that would result from inclusion in a larger system, and for such other items as anticipated relief from passenger deficits. An exchange of stock was ordered based upon the relative earnings of the three lines and N&W, as adjusted. In the case of D&H, N&W was permitted as an alternative to purchase the D&H assets for a discounted all-cash price.

under Appendix O, to purchase stock control of the three lines through wholly owned subsidiaries. 330 I.C.C. 780. The E–L stockholders thereupon voted immediate approval of the terms; the stockholders of the other two roads have not yet voted, although the D&H Board of Directors has voted to recommend approval.

In the Penn-Central case, the Commission concluded that Penn and Central "should be allowed to proceed with consummation of the merger" (330 I.C.C. at 361), but that revised Appendix G conditions were required to minimize any adverse effect of the merger which the three roads might suffer if there is any interim between Penn-Central's consummation and actual inclusion of the three into N&W (330 I.C.C. at 329). The Commission found that the protected lines' request for capital loss indemnity was moot, since it had concurrently found in the Inclusion case that none of the three lines would suffer any impairment of capital value as a result of the Penn-Central merger (330 I.C.C. at 360). The Appendix G traffic and revenue indemnity conditions were strengthened and new provisions were added to prevent any manipulation of the conditions which might harm competing railroads. The Appendix G protection will end for each protected line upon its actual inclusion; or, if no such inclusion is effected within one year from the final determination of the present inclusion petitions or of any new petition that may be seasonably filed, the protection "shall end when this Commission shall so order" (330 I.C.C. at 362).

Another railroad which claims to be affected by the merger is the Reading Railway. In the Commission proceedings, Reading stated that it would not oppose the merger if the standard routing and gateway conditions were imposed. Its lack of interest was buttressed by evidence furnished by Reading to the State of Pennsylvania, and introduced at the hearings, showing that no more than 3% of Reading's traffic could be affected by the Penn-Central merger.[3] And when this case was before this Court last Term, the Reading participated only to a limited extent, joining in the briefs filed by its family lines, B&O–C&O.

Subsequent to the Commission's original report, however, Reading sought a reopening of the proceeding, claiming that it would be adversely affected by the merger, and further that it was entitled to protective conditions similar to those adopted for E–L, D&H and B&M. The Commission held that Reading was bound by its original concession that the effect of the merger on it was inconsequential, and confined Reading's participation to showing the effects upon it of the Appendix G conditions and of the inclusion of New Haven in Penn-Central (330 I.C.C. at 357).

N&W, Reading, and other lines also contended that the revenue indemnity conditions created a community of interest between Penn-Central and the protected roads which would lead them to divert traffic to each other at the expense of the unprotected roads. The Commission found this contention to be completely unsupported. However, without objection from

[3] This evidence is reproduced as Appendix A to the Penn-Central brief in the court below.

Penn, Central, or the protected roads, the Commission also included a prohibition against such manipulation and a reservation of jurisdiction to give further relief against it, if necessary (330 I.C.C. at 355).

E–L, D&H and B&M are not the only smaller railroads whose future is interrelated with Penn-Central. The Commission also had to consider the rapidly declining New Haven, whose continued existence now appears to depend upon prompt assistance from a merged Penn-Central.

From the inception of the Penn-Central proceeding, the trustees of the bankrupt New Haven have taken the position that it can survive as a railroad only if included in Penn-Central. In its original report, the Commission concluded "that inclusion of New Haven's freight and passenger operations in this transaction will be consistent with the public interest, and our approval of the merger is conditioned upon such inclusion" (327 I.C.C. at 526–527). After that decision Oscar Gruss & Son, which holds some 14 percent of N–H's first mortgage bonds, urged on reconsideration that the merger should be postponed until N–H's actual inclusion. The Commission held that this would entail undue delay (328 I.C.C. at 306). Gruss sued to enjoin consummation of the merger and a bondholder's committee intervened. The court below at that time dismissed the complaint for lack of standing (*Oscar Gruss & Son, et al.* v. *United States,* 261 F. Supp. 386); on Gruss' appeal, this Court held in a *per curiam* order that, inasmuch as it had previously ordered the merger case remanded to the Commission, it would be "inappropriate to review the decision of

the District Court at this time." The lower court's order was accordingly vacated, with the provision that if appellant were "dissatisfied with the ultimate order of the Commission in the merger proceeding, it may attempt a fresh challenge in the District Court" (386 U.S. 776, 777).

The condition of the New Haven has steadily worsened since this case was last before this Court. In an opinion dated July 11, 1967, the reorganization court found that New Haven's cash depletion was "so serious, that if the present rate of loss continues, there will be insufficient left by late September to meet the payroll" (J.S. B24). Since that time the trustees have been able to stem the cash attrition to a slight extent, so that they now expect to be able to operate until early January, 1968.

The reorganization court had noted that "the New Haven will be faced with a desperately critical situation" if the Penn-Central merger is not consummated promptly, and that "it cannot possibly survive several months of waiting after the Penn-Central merger takes effect to be incorporated into that system" (J.S. B24). In response, the Commission on August 3, 1967, directed the trustees to negotiate a lease with Penn and Central to be "immediately available upon consummation of the Penn-Central merger." When the parties reported the impossibility of preparing a lease in time to meet the New Haven's needs, and submitted counterproposals for a loan from Penn-Central to the New Haven, the Commission issued an order, directing a hearing as to whether a lease, loan or other arrangement would assure continuation of N–H's operations

until its acquisition by Penn-Central. On November 21, 1967, the Commission served an order, providing reasonable and equitable terms for the inclusion of New Haven in the merged Penn-Central system. Subject to the approval of the reorganization court it authorized the immediate transfer of New Haven's assets to Penn-Central, and provided that the proceeds of the sale be made subject to the creditors' liens; and subject to such approval, it further required Penn-Central to lend up to $25 million to the New Haven over the next three years in return for trustees' certificates and to share the New Haven operating losses during the three-year period, until the transfer of assets in fact occurred.

B. PROCEEDINGS IN THE COURT BELOW

After the revised Appendix G and Inclusion decisions were served on June 12, 1967, the court below ordered expedited proceedings in the three cases in which the merger order had originally been challenged, and in the *Gruss* case. It also enjoined consummation pending its decision in the merger cases. Supplemental complaints were filed by all parties who continued to oppose consummation and/or the Appendix G conditions, except Milton J. Shapp and the City of Scranton, who now wished to litigate in another district.[4] E–L and D&H contended that the

[4] Shapp and Scranton intervened in proceedings begun in the District Court for the Middle District of Pennsylvania, *Borough of Moosic* v. *United States, et al.*, Civ. No. 10054. This action was stayed until October 1, 1967 and is now set for hearing December 15, 1967.

Commission should have included a capital indemnity provision among the protective conditions and that consummation should be postponed until after judicial review of the Inclusion order. B&M, which now supported the merger order, was realigned as a defendent.[5]

Proceedings challenging the Inclusion order began in the court below when D&H filed a suit attacking certain of its provisions; B&M and a group of E–L bond holders intervened as plaintiffs. N&W, which had filed a suit in another district challenging the inclusion order,[6] was joined in this action as an involuntary plaintiff. E–L supported the order.[7]

On October 19, 1967, the district court entered its opinion in the *Merger* case, the *Gruss* case, and the *Inclusion* case. It dismissed Shapp and Scranton with prejudice for want of prosecution (J.S. B8–B9)[8] The Appendix G conditions were sustained against claims by N&W and others that the revenue indemnity con-

[5] Similarly, Central Railroad of New Jersey (CNJ), which had opposed early consummation of the merger in the prior proceedings in this Court, has withdrawn such opposition while reserving the right to seek special protective conditions for itself.

[6] *Norfolk & Western R. Co.* v. *United States*, W.D. Va., Civil No. 67–C–51–R. The identical issues decided below are before the Virginia court. But that action has been stayed until further order of the court.

[7] While these proceedings were pending, the Commission entered orders on petitions for reconsideration by D&H and B&M in the Inclusion case, which satisfied D&H but denied the request of B&M (331 I.C.C. 22). Thereafter D&H withdrew its opposition to the Inclusion order.

[8] "J.S."—without a case number—indicates the Jurisdictional Statement filed in No. 778, which, in a separately paginated appendix, reproduces the opinion below.

ditions were an illegal pooling agreement under Section 5(1) of the Interstate Commerce Act (J.S. B10–B12); that they injured the unprotected roads by creating a community of interest which would lead Penn-Central and the protected roads to divert traffic from them (J.S. B13–B14); and that there was no substantial evidence of the merger being in the public interest so long as the Appendix G conditions remained in effect (J.S. B14–B15). It held that the Commission did not err in declining to adopt a capital loss indemnity provision or in not reserving jurisdiction to do so (J.S. B15–B17). Nor was the Commission required to anticipate and forestall stockholder rejection of inclusion by deciding that the three roads can never be included in Penn-Central (J.S. B31). The court also upheld the Commission's refusal to consider Reading's tardy demand for special protective conditions (J.S. B18–B22).

In the *Gruss* case the court, treating the New Haven bondholders as having standing, refused to enjoin consummation for their benefit because a merged Penn-Central system is essential to preservation of the New Haven's operations. The bondholder's complaints were dismissed without prejudice to any further relief they might wish to seek after the Commission's order for emergency relief to the New Haven.

In the *Inclusion* action, the court sustained the Commission's findings that inclusion of the three lines in the N&W system would be consistent with the public interest. No error was found in the Commission's forecast of earnings for E–L, D&H and B&M as part of a

larger system;[9] or in the refusal to consider inclusion of the three roads only in the broader context of N&W's proposal for a merger with the Baltimore & Ohio-Chesapeake and Ohio system;[10] or in its failure to forestall possible stockholder rejection of inclusion by finding that incorporation of any of the three roads in Penn-Central would be contrary to the public interest. The court rejected N&W's claim that the price for the three roads, when adjusted for the effects of the Penn-Central merger, was too high, and B&M's contention that the price was too low (J.S. B33–B49, B52–B56). It also concluded that the Commission's order must be taken to have encompassed the possibility that the stockholders of all three roads might not accept inclusion in N&W. In this connection, it took notice that E–L stockholders have already voted for inclusion and that D&H's board of directors has voted to recommend acceptance of the prescribed inclusion terms to its stockholders. The court also observed that N&W has a remedy before the Commission and the courts against possible efforts by B&M to join Penn-Central (J.S. B56–B61). Finally, the court held that the E–L bondholders were adequately protected from abuse of their interests by their ability to obtain equitable relief in the courts, and that their failure before the Commission to propose specific suggestions—short of N&W assumption of E–L's long-term debt—barred them from seeking a remand (B62–B63).

[9] Contrary to N&W's contention (No. 779, J.S. 8), the district court addressed itself to the specific steps in the Commission's determination of future earnings (see J.S. B38 to B42).

[10] Under this proposal, the DERECO plan, the three roads, together with the Reading and the Central of New Jersey, would be included into a merged N&W–B&O–C&O system.

ARGUMENT

When the Penn-Central merger was last before the Court, the principal question presented was whether it ought to be allowed to proceed before a haven had been found for three relatively small independent railroads which would be adversely affected by the merger (Erie-Lackawana, Delaware & Hudson and Boston & Maine) and before interim protective conditions for their benefit had been finally settled. Several parties—including the United States—argued that actual consummation of the merger should await determination of those matters, and the Court agreed. Now, however, when the case returns here a year later, this objection has been satisfied. Indeed, after extensive hearings, the Interstate Commerce Commission has determined that the public interest would be served by the inclusion of the three smaller roads in the Norfolk & Western system on terms specified and has formulated detailed provisions for their protection pending actual inclusion. And those decisions have been fully reviewed and sustained by the court below. In our view, nothing of substance remains.

A. SUMMARY OF THE CLAIMS ADVANCED

To be sure, nine appeals have been filed in this Court on behalf of twice as many parties. But the numbers do not accurately reflect the scope of the attack on the decision below. Most of the objectors seek very narrow relief for their own special benefit.

The three roads whose unsettled fate was of major concern a year ago are now all agreed that the Penn-Central merger may go forward without further de-

lay. Two of them (E–L and D&H) conditionally ask for additional protection from Penn-Central should their inclusion in N&W be delayed by a remand of of that order, but they are content if the Commission's decision is affirmed in all respects, as they urge (see No. 832). The third road (B&M) interposes no objection to immediate consumation of the Penn-Central merger on the terms now specified, whatever happens; its appeal (No. 833) seeks only an upward revision of the price fixed for its inclusion in N&W. Although the New Haven itself, through its trustees, states no complaint, two groups of its bondholders (Oscar Gruss & Son and First Mortgage 4% Bondholders Committee) ask that Penn-Central—which has been required to absorb the failing road and has agreed to do so—be ordered to take over management of the New Haven as soon as the merger of the two large roads is effected (Nos. 830 and 831).[11] Reading—an affiliate of C&O–B&O which was very late in asserting a separate claim—prays for special protection from a merged Penn-Central, without however suggesting that consummation of the merger ought to be delayed on that account (No. 834). The Pennsylvania and the New York Central accept the changed conditions imposed upon their merger and make no objection to the "Inclusion order permitting E–L, D&H and B&M to join the Norfolk & Western system. Bondholders of the Erie-Lackawana (John Hancock Mutual Life Insurance Co. et al.) complain (belatedly) only about the Commission's failure to ex-

[11] These jurisdictional statements were of course filed before the Commission's order of November 21, 1967 (see *supra*, p. 10).

pressly retain jurisdiction to protect them, in light of the form of inclusion specified by the Commission—a stock acquisition by N&W, rather than a full-fledged merger which would require N&W to assume E–L's debts (No. 836). And, finally, the City of Scranton and Milton Shapp, although again the only parties who challenge the Penn-Central merger on the merits, are restricted in this Court to a claim that they should have been allowed to transfer their suit out of the court below to another district (No. 835).

There remains the somewhat broader attack made by the Norfolk & Western and its ally, the B&O–C&O (Nos. 778 and 779). But, here again, the issues are quite narrow. Insofar as they ask further delay of the Penn-Central merger, it is basically on the ground that the Commission's Inclusion order does not settle the "ultimate fate" of the three smaller roads offered inclusion in the N&W system because one, and perhaps two, may decline the offer. Exploiting this possibility, these appellants tax the Commission with failing to make express findings with respect to terms of inclusion and protective conditions in the event less than all the three roads ultimately choose to join N&W. N&W also disputes the assumptions upon which the Commission required it to take in the three smaller roads, without however expressly contesting that their inclusion in its system upon proper terms would be in the public interest—a difficult stance, at all events, since it had conditionally agreed to absorb them in consideration of its merger with the Nickel Plate and repeated the offer more recently in its application to merge with the C&O–B&O system.

Even taken at face value, none of these complaints compellingly invokes plenary consideration here. We distinguish, however, between those claims which in our view are, for one reason or another, wholly inappropriate for review in this Court—including some of those advanced in No. 779, and most of those presented in Nos. 830, 831, 832, 833, 834, 835 and 836—and the remaining arguments in Nos. 778 and 779, which tender issues susceptible of meaningful review, although we believe them to be insubstantial.

B. MOST OF THE APPEALS PRESENT NO ISSUE APPROPRIATE FOR REVIEW IN THIS COURT

Some of the objections are directed to matters committed to the expert judgment of the agency which are not appropriate for judicial review, at least at this level. Despite some effort to phrase them in procedural terms, that is the true character of the contradictory claims of B&M (No. 833) and N&W (No. 779) challenging the price specified for the inclusion in N&W of one or more of the three smaller roads. As this Court remarked some years ago (in language quoted below, J.S. B45–B46), "An intelligent estimate of probable future values, and even indeed of present ones, is at best an approximation. The like is true of a forecast of future revenues. There is left in every case a reasonable margin of fluctuation and uncertainty." *Dayton Power & Light Co.* v. *Public Utility Comm'n.*, 292 U.S. 290, 310. When forecasts are required to reach a decision, the Commission's function is "to bring to bear upon the problem an expert judgment" and to make its own "analysis of the total situation." *United States* v. *Detroit Navigation Co.*, 326

U.S. 236, 241. See, also, *Illinois Commerce Commission* v. *United States*, 292 U.S. 474, 481. Accordingly, with respect to the charges levelled at the terms of the so-called "Inclusion" order, we rest on the district court's opinion (J.S. B30–B56) and our brief below where they are fully answered,[12] suggesting that this Court has no duty to re-examine those questions.[12a]

Other objections do not merit further consideration here because their assertion below came too late. That is the posture of the E–L bondholders' complaint in No. 836. What they asked was impractical (see J.S. B62–B63), but, at all events, although forewarned, they chose not to participate in the hearing before Commissioner Webb and offered the Commission no evidentiary basis for a different form of unification

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[12] Joint Brief of the United States of America and the Interstate Commerce Commission, filed in Civil Action No. 67 Civ. 2451. On traffic questions, see pp. 16 *et seq.*; on E–L's commuter assistance, see pp. 39–41; on adjustments for nonrecurring items and changes in operations, see pp. 42–46; on B&M adjustments, pp. 47–50; and on assigning control savings and traffic gains to the three lines, see pp. 50–57. To be sure, the district court states the Commission might have avoided some of these questions and decided the proceeding on grounds less favorable to N&W (J.S. B44, B69); but it expressly disclaimed reliance on such grounds to sustain the Commission (J.S. B44).

[12a] N&W also argues that the district court considered the Commission's forecast of earnings only for their relevance to price and not for their relevance to whether there is any public interest in the inclusion of "deficit" railroads. (No. 779, J.S. 10). The argument begs the essential question of whether the three roads would experience future deficits. The district court sustained the Commission's findings that the smaller roads would not be deficit carriers as part of an enlarged N&W system (J.S. B38 to B42). Moreover, "[i]mplicit in appendix O [to the

for E–L's inclusion in N&W.[13] And like considerations foreclose the Reading's belated request for special protective conditions (No. 834). Having initially taken the position that it would not be seriously affected by the Penn-Central merger and introduced no evidence on the question in the original hearing, we submit that the Commission was fully justified—as the court below found (J.S. B18–B22)—in taking the Reading at its word and declining to reopen the record to accommodate an untimely change of position.[14]

N&W Nickel Plate order] is an obligation on N&W's part to assume a reasonable degree of risk." 330 I.C.C. at 841. N&W knew when Appendix O was adopted that the three roads were weaker lines. It is their very weakness which requires their inclusion, the Commission having found in the *Penn-Central* case that their preservation was essential to the public interest (327 I.C.C. at 529; 330 I.C.C. at 793) and that they must be included in a major system. That was, of course, the purpose of Appendix O and of Section 5(2)(d) of the Interstate Commerce Act, 49 U.S.C. 5(2)(d), under which it was adopted. As the court below observed (J.S. B–34): "Recognizing that voluntary consolidation would include only the more desirable candidates and would leave the weaker brethren to languish, Congress authorized the Commission to condition permission to consolidate on the inclusion of undesired lines." By consummating its merger with the Nickel Plate, and thus irrevocably assenting to Appendix O, N&W achieved gains and savings which will reach approximately $29 million per year (324 I.C.C. at 85–88) which the Commission found would not be affected by the required inclusion (330 I.C.C. at 801); it has already realized $12 million of this amount (330 I.C.C. at 791).

[13] While their objection to the form of unification comes too late, the courts of equity stand in the way of any attempt by N&W to abuse its control position over E–L to the prejudice of its bondholders (see J.S. B63).

[14] We may add that the district court, evaluating the late-tendered evidence which had been rejected by the Commission,

For similar reasons, the appeal filed by the City of Scranton and Milton Shapp (No. 835) presents nothing of substance. Plainly, their frontal assault against the merits of the Penn-Central merger is precluded from consideration here by their refusal to go forward in the court below. Nor is there merit in the contention of these parties, who had invoked the jurisdiction of the court below, that they should have been left free to litigate elsewhere. In the circumstances, the district court certainly did not abuse its discretion in refusing to allow them to withdraw a complaint voluntarily filed so as to clear the way for another court to entertain it in a fresh proceeding. And, after three warnings (J.S. A7–A11; No. 835 J.S. 2a–3a; No. 835 J.S. 5a–7a) and two defaults (see J.S. B8–B9), the City of Scranton and Mr. Shapp certainly cannot dispute their dismissal for want of prosecution.

Finally, we submit that the appeal of the New Haven bondholders (Nos. 830 and 831) presents no issue appropriate for review here—albeit the considerations are somewhat different in this instance. We do not tax these parties with any delinquency. Yet, insofar as they insist on complete inclusion of the New Haven before the Penn-Central merger is consummated, their suggestion is impractical and unnecessary.

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concluded that "the new evidence sought to be offered was scarcely persuasive." (J.S. B21). The lower court further noted that, while the new evidence did not purport to estimate how much traffic would actually be diverted to Penn-Central, it "admitted * * * that the traffic most likely to be diverted was the traffic exchanged with NYC at Newberry Junction—the same traffic that Reading's President discussed in his 1962 letter to the Commonwealth of Pennsylvania" which suggested a diversion amounting to no more than 3 percent of Reading's total traffic (*ibid.*).

The reorganization court and the court below have both expressed the opinion that the New Haven cannot survive several months unaided (see J.S. B24–B29) and no one disputes that hard reality. Nor is it challenged that the only source of that aid is a merged Penn-Central, which has now been required to furnish it immediately upon consummation.[15] Accordingly, if the New Haven is to survive as a railroad, it must allow consummation of the Penn-Central merger before its own inclusion can occur. To be sure, there is the alternative of liquidation, but that solution, whatever its appeal to the bondholders, must be dismissed as inconsistent with the Commission's uncontradicted finding that continuance of the New Haven's passenger and freight operations is important in the public interest. Cf. *R.F.C.* v. *Denver & R.G.W.R. Co.*, 328 U.S. 495, 535–536.

At all events, however, immediate inclusion of New Haven is unnecessary to give the bondholders protection. The Commission has retained jurisdiction to adjust the price in the event New Haven experiences traffic diversion to the merged road. Moreover, subject to the approval of the reorganization court the Commission has now authorized an immediate transfer of the New Haven's assets to the merged road—which could bring an early end to the operating losses being suffered by the New Haven estate—and it has further required Penn-Central to assume a portion of the New Haven operating loss prior to its actual inclusion.

[15] See the Commission order of November 21, 1967, summarized in the Statement, *supra*, p. 10, copies of which have been lodged with the Clerk of the Court. That order also advanced inclusion of the New Haven by approving the price agreed upon by Penn-Central and the New Haven Trustees.

C. THE REMAINING CLAIMS PRESENT NO SUBSTANTIAL QUESTION

We turn now to two contentions advanced by the appeals in Nos. 778 and 779 which seem to us to present issues proper for review in this Court, albeit we believe they are without substance.

1. THE CLAIM THAT THE FATE OF THE THREE PROTECTED CARRIERS HAS NOT BEEN SUFFICIENTLY DETERMINED TO PERMIT PRESENT CONSUMMATION OF THE PENN-CENTRAL MERGER

One can debate whether this Court's prior opinion required that the Penn-Central merger be delayed only until the conclusion of the then pending "Inclusion case"—involving the petitions of E-L, D&H and B&M to be included in the N&W system—whatever the result there; or, rather until an appropriate haven had been found for each of these roads, even if that required further proceedings. Although either reading is possible,[16] we may accept the latter interpretation since, as it happens, the inclusion order, affirmed by the court below, does provide a home for each of the roads. The charge is, however, that the Commission's order is insufficient predicate for the Penn-Central merger because the mere *offer* of inclusion does not settle the "fate" of the affected roads until it is accepted by them.

a. At the outset, we note that N&W asks far more than the smaller roads whose fate is directly involved. Last Term, E–L, and D&H—supported by the United States—sought delay of the Penn-Central merger only until disposition of their petitions to be included

[16] Compare the references to culmination of the pending "inclusion" proceedings, 386 U.S. at 378, 390, 392, with other passages adverting to the "ultimate fate" or "future" of the three roads, 386 U.S. at 378, 390.

in the N&W system, and, now, all three roads are content to allow consummation to proceed. Moreover, there is not the slightest intimation in the Court's opinion that the Commission was required to do more than offer the potential victims of the merger a safe haven on equitable terms.

The present contention, then, cannot invoke the interest of the affected roads or rest on any ruling by this Court. Judged on its own merits, the argument must fall. The major flaw of N&W's insistence that the Commission delay the Penn-Central merger until and unless each road is actually committed to inclusion in a major system is that it ignores the statutory limitations on the Commission's powers. Under Section 5 of the Interstate Commerce Act, the Commission can only determine whether, and upon what conditions, carrier-initiated proposals for merger or inclusion will be in the public interest; the final decision to accept or reject the terms upon which a unification is approved remains with the stockholders of the carriers involved. Here, because N&W consented in advance as a condition of its merger with Nickel Plate, the Commission may compel N&W to offer inclusion to the three smaller roads on specified terms; but that action exhausts its power; the Commission cannot order the beneficiaries of the order to accept the proffered home.

Against this background, the suggestion that consummation of the Penn-Central merger should await the decision of the stockholders of D&H and B&M [17] whether to accept or reject the offer of inclusion in

[17] As noted in the Statement, the E–L stockholders have already voted in favor of inclusion.

N&W is without meaning. Indeed, nothing can turn on that vote. We may suppose—contrary to the unanimous recommendation of their board of directors [18]—that the stockholders of D&H reject inclusion, although the terms are found to be equitable. Should this happen, the Commission cannot force acceptance; nor can it adjust the terms unfairly to N&W merely because D&H insists on a better price. Is the Penn-Central merger to be upheld indefinitely on this ground? Surely, not.

b. Nor is there merit in the further suggestion that the Commission was obliged to determine, in the alternative, whether it would approve inclusion of one or more of the protected lines in Penn-Central, in the event the N&W inclusion terms should be rejected by their stockholders.

Such a speculative determination would have been premature before any road had in fact refused the proffered haven of N&W—an eventuality not yet realized. The Commission is not required to assume that the solution which it finds in the public interest and fair to all parties will be blocked by stockholder action. The question of possible inclusion of one or more of the small roads in Penn-Central presents

[18] It should be noted that N&W's predictions as to the probable action of the D&H and B&M stockholders is mere speculation. With respect to D&H, the speculation is based entirely upon a statement of D&H's President, made *before* the D&H Board of Directors unanimously voted to recommend to the stockholders that the inclusion terms be accepted. As to B&M, it appears that N&W is simply assuming that because the terms fixed by the Commission are below the current market price and are being challenged in this Court by B&M, they will necessarily be rejected by the stockholders. At this point, neither D&H nor B&M stockholders have voted on the inclusion terms.

difficult and highly controversial issues which the Commission could not resolve without extensive further hearings. In the circumstances, we submit the Commission was fully justified in declining to undertake those inevitably protracted proceedings in advance of the necessity for so doing. And, of course, without a record basis, it would have been improper to foreclose the Penn-Central alternative in order to pressure the stockholders of the affected roads into accepting the present offer of inclusion in N&W.

At all events, it is not clear how the public interest would be prejudiced by allowing the merger to go forward before the Commission decides whether any road that refuses to join N&W may be included in Penn-Central. To be sure, it was argued last Term that the merger ought not be consummated until it was determined whether E-L, D&H and B&M could be included on equitable terms in N&W consistently with the public interest—because, if that solution were found inappropriate for any reason after the merger had been consummated, the Commission might be left with no option but to allow these roads to join Penn-Central, no matter how unattractive that alternative. But that is no longer the situation. Having offered the three roads an appropriate home on fair terms, the Commission is now free to judge any request to join Penn-Central on the merits. If competitive considerations foreclose that solution, theowners of the affected road may suffer. But the Penn-Central merger —determined to be in the public interest—cannot be halted because particular interests have indulged in a rash gamble which the Commission is powerless

to prevent. It is noteworthy that the applicants for inclusion do not themselves complain that their choice is embarrassed because they have not been advised whether this is their only chance for inclusion.[19]

On the other hand, it may be that inclusion of the affected roads in Penn-Central can be so conditioned as to avoid the New England rail monopoly that N&W portrays. And, finally, there remains the possibility that any road opting against present inclusion will be permitted to join an N&W–C&O–B&O system, if the application for that consolidation is ultimately approved—a matter now closer to resolution.

We conclude that—consistent with this Court's prior decision—the Commission has fully met its responsibility by providing E–L, D&H and B&M the opportunity for inclusion in a major rail system on equitable terms and that there remains no justification for any further delay in consummation of the Penn-Central merger.

2. THE CLAIM THAT THE COMMISSION'S ORDERS ARE PREMISED ON THE FALSE ASSUMPTION THAT ALL THREE AFFECTED ROADS WOULD NECESSARILY ACCEPT INCLUSION IN N&W

We have just discussed the argument that—because of this Court's mandate or for independent reasons—consummation of the Penn-Central merger cannot proceed until the affected roads have actually committed themselves to inclusion in N&W or another major system. There is, however, a further con-

[19] The Commission has, however, advised them that rejection of an offer of inclusion in N&W will result in loss of their right to petition for compulsory inclusion in a Penn-Central system (330 I.C.C. at 868–869).

tention advanced in Nos. 778 and 779—related but discrete. It is that, even if, upon proper findings, the merger could go forward before stockholders of D&H and B&M vote, this would now be improper because neither the Commission's inclusion order nor its merger order adverts to the possibility that one or more of the affected roads will reject the offer to join N&W.

a. We turn first to the claim that the inclusion order, in concluding that the public interest would be served by N&W's absorbing the three small roads, ignores the eventuality that less than all of the lines offered a home with N&W will accept it. The premise is erroneous, as an examination of Appendix F to the *Inclusion* decision reveals (330 I.C.C. at 868). The Commission there explicitly ruled that N&W should acquire control of D&H and B&M only on condition that it acquired control of E–L; and that it should acquire control of B&M only if it acquired control of both of the other carriers. Thus the order plainly contemplated the possibility of stockholder rejection and accordingly provided for inclusion of E–L alone, E–L and D&H or all three.[20]

These provisions, of course, reflect the facts of geography upon which the public interest largely turns. E–L provides single line east-west freight service between the southern tier of New York and Chicago,

[20] Appendix F also provides that if the stockholders of any petitioner reject inclusion, their petition for inclusion in the Penn-Central system is dismissed and that if N&W does not acquire control of E–L or of E–L and D&H, the petitions of D&H and B&M, or B&M, respectively, in the *Inclusion* case will be dismissed. (330 I.C.C. at 868–869.)

and serves as the physical connection between N&W and D&H and B&M; D&H is a bridge carrier linking E–L and B&M; B&M serves northern and central New England. The Commission found that inclusion of E–L in N&W would enable the enhanced N&W system to compete more effectively for traffic in the New York-New Jersey Port of New York area and that D&H would form an important link between a combined N&W–E–L and New England.[21] Thus the Commission implicitly found that inclusion of E–L, or E–L and D&H alone, would greatly strengthen N&W's ability to compete with Penn-Central and would provide the protection for these carriers contemplated by the Commission's ruling in the Penn-Central case and this Court's decision in *Baltimore and Ohio* v. *United States, supra.* 330 I.C.C. 792–796, 822, 868.

b. N&W also argues that the Commission failed to take note of the effect of non-inclusion of one or more of the lines on the price of the roads to be included. The fact is, however, that the differences are very slight. If D&H or B&M declined entry into the N&W system, some traffic revenue the included roads would otherwise gain from rerouting would be denied them. But this would reduce E–L's net income by only $500,000, if both D&H and B&M stayed out, and D&H's income by only $200,000 if B&M remained in-

[21] There is no basis for N&W's contention that if B&M remains independent D&H will become "a bridge line to nowhere." B&M has an important interchange for New England traffic with D&H which will be as significant to it if D&H is part of N&W as it is now. B&M's own self interest requires it to preserve routings over D&H.

dependent.[22] As to increased losses to Penn-Central, the Commission found that, without B&M, these losses would be somewhat larger, but that the record permitted no reliable estimate of the exact effect (330 I.C.C. at 840).[23] N&W, which was best situated to furnish evidence as to how inclusion of the three roads into its system would affect it and them, came forward with no independent studies as to the effects of inclusion on the three roads or itself either from the standpoint of traffic gains or of losses to Penn-Central (330 I.C.C. at 833–835). At all events, N&W's investment in the three roads is protected by the cushions and other advantages (*e.g.*, tax savings) which the Commission provided (see J.S. B50 *et seq.*).

Moreover, if the Commission had undertaken to recompute in detail the price for each road in the light of the possibility that the stockholders of D&H or B&M might reject inclusion, the Inclusion proceedings would have been bogged down in lengthy and arid "what if" proceedings. At best, estimates of how

[22] The Commission's findings show D&H's contribution to E–L's revenues to be $633,775 and B&M's to be $602,611 (330 I.C.C. at 834, table, line 2). The omission of this traffic reduces E–L's net earnings by only $500,000, and its earnings per share of $1.99 computed by the Commission (at 816) to $1.89; such a reduction affects neither the public interest in E–L's inclusion nor the financial terms. Similarly, if D&H's traffic gains resulting from rerouting exclude B&M's contribution of $491,402 (330 I.C.C. at 834, table, line 3), on the supposition B&M will vote to remain outside the N&W system, D&H's annual net earnings are reduced by only $160,000; D&H earnings per share of $3.84 (331 I.C.C. at 33) become $3.74 and do not affect the result reached by the Commission.

[23] The Commission made no separate finding as to the impact on E–L if both D&H and B&M stayed out, but the same considerations are obviously true.

traffic will move are uncertain—involving as they do a prediction of the individual responses of thousands of shippers (see 330 I.C.C. at 833); when combined into widely varying hypothetical possibilities they become sheer speculation. N&W's arguments demand detailed findings and predictions which go beyond the limits of the administrative process. Cf. *Group of Investors* v. *Milwaukee R. Co.*, 318 U.S. 523, 538–539. The Commission cannot provide a solution to every permutation and combination of events that ensue from its orders. It can only define equitable terms that offer an opportunity to be included in a more rationally structured railroad system. Reasonable application of Section 5 of the Interstate Commerce Act, as presently written, does not require more.

c. Finally, N&W objects that the Appendix G conditions will become indefinite if either D&H or B&M reject inclusion and that there has been no finding that this is consistent with the public interest. Within the limits of its powers, however, the Commission has provided for this contingency. Under the very terms of Appendix G (330 I.C.C. at 362), the protected period extends only until disposition of the pending petitions for inclusion or one seasonably filed, and if no actual inclusion is accomplished within one year of the final determination of such petition, the protective conditions may be altered or terminated by order of the Commission. In addition, under Appendix F to the Inclusion order (330 I.C.C. at 868), if the stockholders of any of the three roads reject the terms of inclusion in N&W, its petition for inclusion in Penn-Central will be considered dismissed. There is little more that

the Commission can do under its existing powers. It would frustrate the purposes of the Transportation Act of 1940 to allow stockholder self-interest to delay indefinitely a merger which the Commission has found to be in the public interest, and whose prompt consummation is vital to the survival of another road, after reasonable terms for inclusion of carriers in a major carrier have been established.

CONCLUSION

For the reasons stated, we submit that the judgment of the district court should be affirmed.

Respectfully submitted.

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